

122 FERC ¶ 61,127
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Midwest Independent Transmission System
Operator Inc.

Docket Nos. ER06-18-009
ER06-18-010

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued February 12, 2008)

1. On March 15, 2007, the Commission conditionally accepted proposed revisions to the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) Open Access Transmission and Energy Markets Tariff (TEMT)¹ to incorporate a proposed cost allocation methodology for Regionally Beneficial Projects that was established through the Midwest ISO's Regional Expansion Criteria and Benefits (RECB) Task Force.² On July 23, 2007, the Commission issued an order denying requests for rehearing of the RECB II Order and conditionally accepting the Midwest ISO's April 16, 2007 compliance filing (April 16 Compliance Filing).³ As discussed below, the Commission rejects a request for rehearing of the RECB II Order on Rehearing and Compliance.
2. The RECB II Order on Rehearing and Compliance directed the Midwest ISO to file certain changes to the language set forth in the cost allocation proposal. As discussed below, the Commission conditionally accepts the revised tariff sheets that the Midwest

¹ Midwest Independent Transmission System Operator, Inc., FERC Electric Tariff Third Rev. Vol. No. 1.

² *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,209 (RECB II Order), *order on reh'g and compliance*, 120 FERC ¶ 61,080 (2007) (RECB II Order on Rehearing and Compliance). Regionally Beneficial Projects are economic upgrades that meet specific standards, as discussed herein.

³ RECB II Order on Rehearing and Compliance, 120 FERC ¶ 61,080.

ISO submitted to comply with this requirement (August 22 Compliance Filing), effective April 1, 2007, as requested.⁴

I. Background⁵

A. RECB II Filing

3. On November 1, 2006 (as amended on November 8, 2006) the Midwest ISO filed a proposed cost allocation methodology for Regionally Beneficial Projects (RECB II Filing). Under its proposed “Weighted Gain-No Loss” approach, the Midwest ISO sought to ensure that proposed economic projects will have a regional benefit and that the cost of any such projects are borne only by those entities that benefit from them.

4. For a project to qualify as a Regionally Beneficial Project in the Midwest ISO’s Regional Transmission Expansion Plan (MTEP) process, it must satisfy two benefits tests. First, the present value of the Adjusted Production Cost benefit (production cost benefit)⁶ and the Locational Marginal Pricing (LMP)-based energy cost benefit (LMP energy cost benefit),⁷ determined in the aggregate for all generation and load nodes under

⁴ The April 1, 2007 effective date is consistent with the effective date requested in the Midwest ISO’s original RECB II proposal and accepted in the RECB II Order.

⁵ A broader history of cost allocation and pricing in the Midwest ISO region is summarized in the RECB II Order. *See* RECB II Order, 118 FERC ¶ 61,209 at P 16-23. The RECB II Order also provides a brief background regarding the Midwest ISO’s “RECB I” proceeding, which addressed, among other things, the Midwest ISO’s proposed cost allocation for network upgrades, including Baseline Reliability Projects. Baseline Reliability Projects are upgrades needed to maintain reliability while accommodating the ongoing needs of existing market participants and transmission customers’ existing load requirements. *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,106 (RECB I Order), *order on technical conference, reh’g and compliance*, 117 FERC ¶ 61,241 (2006) (RECB I Order on Rehearing), *order on reh’g*, 118 FERC ¶ 61,208 (2007) (RECB I Further Order on Rehearing).

⁶ The production cost benefit is the calculation of production cost savings (benefits) due to the transmission expansion, adjusted to reflect changes in sales and purchases that may occur as a result of the expansion.

⁷ The LMP energy cost benefit is calculated by multiplying the LMP at each modeled load bus within the sub-region by the load at the bus for each period of the planning model simulation. The intent is to measure reductions in load energy payments resulting from LMP reductions associated with the expansion.

the TEMT, must each be greater than zero. The total project benefit is a weighted value defined as the sum of 70 percent of the production cost benefit and 30 percent of the load's LMP energy cost benefit. Second, a proposed project must satisfy a variable project Benefits/Costs Ratio threshold. The Benefits/Costs Ratio threshold varies linearly from 1.2 (for projects that have an in-service date within one year of the project's MTEP approval date) to 3.0 (for projects that have an in-service date ten or more years from the project's MTEP approval date).

5. The RECB II Filing also required that a project meet three further tests to qualify for regional cost allocation. The project must: (1) cost more than \$5 million, (2) involve facilities with voltages of 345 kV or more (high-voltage), and (3) not be a Baseline Reliability Project or New Transmission Access Project (as defined in the RECB I proceeding). These tests are intended either to be consistent with or to complement the qualifying tests the Commission accepted in the RECB I proceeding.

6. If a project: (1) meets the Benefits/Costs Ratio threshold; and (2) is designated a Regionally Beneficial Project eligible for regional cost allocation, then 20 percent of the costs of the project will be allocated on a load ratio share basis to all Midwest ISO customers (*i.e.*, a "postage-stamp" rate)⁸ and 80 percent will be allocated among three geographic sub-regions (West, Central and East) based on a beneficiary analysis. Once each sub-region is assigned its portion of the project cost, the cost allocation to each individual entity within each geographic sub-region will be on a load ratio share basis to reflect the potential for shifting beneficiaries within the sub-region over time.

7. The proposed RECB II methodology provides for a deviation from the above cost allocation when either the production cost benefit or the LMP energy cost benefit to any one of the three sub-regions is negative. Under this circumstance, that sub-region would not be allocated a share of the 80 percent sub-regional component and that 80 percent of project costs will be allocated only to benefiting sub-regions. According to the Midwest ISO, this "No Loss" piece of the Weighted Gain-No Loss analysis was intended to protect customers in a sub-region from being allocated costs when they may not benefit from the upgrade.

⁸ Under a postage-stamp rate design, all customers taking transmission service for delivery to load within a Regional Transmission Operator (RTO) pay the same rate, reflecting the average embedded costs of the transmission facilities throughout the RTO. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 109 FERC ¶ 61,168, at P 11 n.16, *order on clarification*, 109 FERC ¶ 61,243 (2004).

B. RECB II Order

8. The Commission conditionally accepted the RECB II Filing. Relying, in part, on the principles articulated in Order No. 890,⁹ the Commission found the principles expressed in, and the cost allocation methodology set forth in, the original RECB II proposal (subject to certain conditions) to be just and reasonable. Among other things, the Commission required netting in the Weighted Gain-No Loss approach such that: (1) the present value of the production cost benefit and the LMP-based energy cost benefit, determined in aggregate for all generation and load nodes under the tariff, are netted against each other and that *sum* must be greater than zero; and (2) the “no loss” aspect of the proposal (*i.e.*, the potential exemption from sub-regional cost allocation) be implemented only when the *sum* of the production cost benefit and the LMP energy cost benefit to any one of the three sub-regions is negative.¹⁰

⁹ These principles include, among other things: supporting regional flexibility; and consideration of whether a cost allocation proposal fairly assigns costs among participants, provides adequate incentives to construct new transmission, and is generally supported by state authorities and participants across the region. RECB II Order, 118 FERC ¶ 61,209 at P 24-26 (citing *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 559-61 (2007)).

¹⁰ The RECB I Order on Rehearing had already directed the Midwest ISO to study, as part of its post-transition rate design filing to be made in August 2007, the effectiveness of the cost-sharing methodology accepted therein for new facilities. RECB I Order on Rehearing, 117 FERC ¶ 61,241 at P 66; RECB I Further Order on Rehearing, 118 FERC ¶ 61,208 at P 28. The RECB I Order on Rehearing also directed the Midwest ISO to file a report specifically as to generator interconnection cost allocation by November 29, 2007. RECB I Order on Rehearing, 117 FERC ¶ 61,241 at P 83 and Ordering Paragraphs (C) and (D).

In the RECB II Order, the Commission directed the Midwest ISO to include in that report a discussion of how the approved cost allocation methodologies for Baseline Reliability Projects and Regionally Beneficial Projects relate to the methodology that the Midwest ISO plans to submit for allocating the costs of *existing* projects. The Commission further directed the Midwest ISO to make reports by August 2008 and August 2009 that analyze the effectiveness of all of the transmission expansion cost allocation methodologies. The Commission stated that these reports will enable review of, among other things: (1) the effectiveness of the postage-stamp rates for both Baseline Reliability Projects and Regionally Beneficial Projects, and (2) the discrete issues discussed in the RECB II Order. RECB II Order, 118 FERC ¶ 61,209 at P 35.

C. RECB II Order on Rehearing and Compliance

9. In the RECB II Order on Rehearing and Compliance, the Commission denied requests for rehearing of the RECB II Order. The Commission also conditionally accepted the Midwest ISO's April 16 Compliance Filing, and required the further compliance filing that is addressed in this order. The issues addressed by that order, as relevant here, will be discussed further below.

II. Notices and Responsive Filings

10. Indianapolis Power & Light Company (IPL) filed a timely request for rehearing, or in the alternative, motion for reconsideration, of the RECB II Order on Rehearing and Compliance.

11. Notice of the August 22 Compliance Filing was published in the *Federal Register*, 72 Fed. Reg. 50,355 (2007), with interventions and protests due on or before September 12, 2007. Comments and protests were filed by American Transmission Company LLC and ATC Management Inc. (collectively, ATCLLC); and Integrys Energy Group, Inc., and its subsidiaries, Wisconsin Public Service Corporation, Upper Peninsula Power Company and Integrys Energy Services, Inc. (collectively, Integrys). The Midwest ISO filed an answer to the protests.

III. Discussion

A. Procedural Matters

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the Midwest ISO's answer because it has provided information that assisted us in our decision-making process.

B. Request for Rehearing Cost Obligations for Withdrawing Members

1. RECB II Order on Rehearing and Compliance

13. In the original RECB II proposal, the Midwest ISO did not specify a Transmission Owner's responsibility for transmission costs allocated prior to that Transmission Owner's withdrawal from the Midwest ISO. However, in response to comments, the Midwest ISO stated that stakeholders intended that a withdrawing party would not be able to escape its Attachment FF cost responsibilities, consistent with the withdrawal

provisions found in Article Five of the Midwest ISO TO Agreement.¹¹ In the RECB II Order, the Commission directed the Midwest ISO to revise Attachment FF to clarify that withdrawal does not absolve a Transmission Owner of its responsibility for the costs of upgrades previously allocated it.

14. In the RECB II Order on Rehearing and Compliance, the Commission denied IPL's request for rehearing on this issue. The Commission found that cost allocations made under Attachment FF are rightfully included in the phrase "all financial obligations" contemplated by the TO Agreement.¹² The Commission also found that assignment of such costs to the remaining, non-withdrawing members of the Midwest ISO "would create volatility and uncertainty in the ratemaking process"¹³ Moreover, the Commission rejected IPL's arguments that the Commission lacked jurisdiction to allow transmission costs to be allocated to departing load, noting that the Commission's finding authorizes qualifying charges to existing transmission-owning members that subsequently decide to withdraw from the Midwest ISO.¹⁴ The Commission also rejected IPL's argument that once it withdraws from the Midwest ISO it will no longer receive benefits from the transmission upgrades for which it was allocated costs, noting that "IPL will continue to reap the benefits from expanded transmission capacity in the form of improved reliability and reduced congestion charges."¹⁵

15. The Commission conditionally accepted the Midwest ISO's proposed language for a new section III.A.2.i of Attachment FF, directing the Midwest ISO to clarify the language to ensure that the scope of the provision is limited to financial obligations under Attachment FF.¹⁶

¹¹ Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., FERC Electric Tariff, First Rev. Rate Schedule No. 1 (TO Agreement).

¹² RECB II Order on Rehearing and Compliance, 120 FERC ¶ 61,080 at P 83.

¹³ *Id.*

¹⁴ *Id.* P 84.

¹⁵ *Id.* P 85.

¹⁶ *Id.* P 86.

2. Request for Rehearing

16. IPL filed a request for rehearing, or in the alternative, motion for reconsideration of the Commission's refusal to grant rehearing in the RECB II Order on Rehearing and Compliance. IPL argues that the Commission erred in upholding its decision to hold a withdrawing member responsible for its share of the costs of Regionally Beneficial Projects allocated prior to withdrawal from the Midwest ISO.¹⁷

17. First, IPL argues that the Commission erred in finding that the withdrawal provisions of the TO Agreement should include costs assigned under Attachment FF. IPL reiterates its argument (from its request for rehearing of the RECB II Order) that Article Five, section II.B of the TO Agreement only relates to administrative-type expenses related to Schedules 10, 16 and 17 of the TEMT. IPL argues that the Commission's position would make withdrawing members "responsible for an up-front lump-sum payment on a net present value basis of the charges it would incur under Attachment FF if it continued to participate in the Midwest ISO."¹⁸ IPL maintains that this would be unjust and unreasonable, "violating fundamental ratemaking principles regarding recovery of utility investment and prevention of intergenerational inequities."¹⁹

18. IPL also challenges the Midwest ISO's statement (in its answer to protests to the April 16 Compliance Filing) that the majority of RECB II stakeholders intended to place

¹⁷ IPL states that the rejection of its request for rehearing of the RECB II Order in the RECB II Order on Rehearing and Compliance makes this issue ripe for appeal. IPL notes, however, that it is filing this request for rehearing, or in the alternative, motion for reconsideration, to preserve its rights for appeal. In particular, IPL notes that its request for rehearing could be deemed necessary because: (1) the Commission's determinations in the RECB II Order on Rehearing and Compliance "go beyond those expressed in the RECB II Order and the Commission required further modification to the proposed compliance language;" (2) in the RECB II Order on Rehearing and Compliance the Commission simultaneously rejected IPL's protest to the August 16 Compliance Filing, "which could arguably give rise to a new requirement to seek rehearing;" and (3) "the Commission's policy is to entertain a party's motion for consideration of a rehearing order where the party believes the Commission may have overlooked or misunderstood facts or arguments set forth in the party's rehearing request." IPL Request for Rehearing at 7-8.

¹⁸ *Id.* at 12. IPL states that if this assumption is not correct the Commission should clarify that it is only referring to the Attachment FF costs allocated to the withdrawing member for the year in which it withdraws. *Id.* n.34.

¹⁹ *Id.* at 12.

these costs on withdrawing members. IPL notes the stakeholders cannot change the rights and responsibilities adopted in the TO Agreement. It also argues that if a withdrawing member continues to take transmission service under the TEMT and benefit from Regionally Beneficial Projects, it “will support them through the transmission charge it pays for the future service.”²⁰

19. Second, IPL argues that the assessment of Attachment FF charges to withdrawing members is inconsistent with cost causation principles and the Commission’s pricing policies. IPL argues that if a withdrawing member is considered a transmission customer, then it is reasonable for it to pay a fair share of the cost of the transmission facilities it uses. However, if an entity is not reserving service under the TEMT, it is not benefiting from the facilities and, therefore, it would be unjust and unreasonable to continue to allocate these costs to the departed load. IPL argues that, alternatively, a withdrawing member could be considered not a customer, but a part owner of the Regionally Beneficial Project. IPL argues that if so, then it is reasonable for the withdrawing member to continue paying its share of development costs of a Regionally Beneficial Project, but this scenario would require the Midwest ISO to convey certain ownership interests and rights upon a member’s withdrawal.²¹ IPL argues that if a withdrawing member is considered a part owner in new transmission projects that it has funded, then the denial of related financial rights would be a governmental taking without compensation in contravention of the Fifth Amendment.²²

20. Third, IPL argues that the Commission’s conclusion that, after withdrawal, IPL would “continue to reap the benefits from expanded transmission capacity in the form of improved reliability and reduced congestion charges” is unsupported and incorrect.²³ IPL notes that if it withdraws from the Midwest ISO, it would continue as its own balancing authority area responsible for meeting all NERC and regional reliability requirements. It also notes that, if it were not a transmission customer, it would not be exposed to congestion charges.

²⁰ *Id.* at 13.

²¹ IPL notes, in particular, the conveyance of long-term transmission rights. *Id.* at 15-16 (citing, *inter alia*, *Long-term Transmission Rights in Organized Electricity Markets*, Order No. 681, FERC Statutes and Regulations ¶ 31,226 at P 210 (2006); *Cal. Indep. Sys. Operator Corp.*, 110 FERC ¶ 61,271 (2005); *Midwest Indep. Transmission Sys. Operator, Inc.*, 105 FERC ¶ 61,212 (2003)).

²² *Id.* at 17 (citing U.S. Const., amend. V).

²³ *Id.* at 18 (citing RECB II Order on Rehearing and Compliance, 120 FERC ¶ 61,080 at P 85).

21. IPL contends that, as demonstrated in its August 1, 2007 informational filing in this proceeding,²⁴ it is already experiencing adverse cost shifts as a result of the cost allocation methodology for Baseline Reliability Projects. IPL states that its estimated share of other entities' transmission projects is \$7.2 million from the Midwest ISO's MTEP06, while other entities' share of the cost of IPL's transmission projects is \$0. IPL argues that this problem will get worse, anticipating an annual \$5.6 million cost shift in five years and an annual \$16.5 million cost shift in ten years.

22. Fourth, IPL argues that costs associated with Regionally Beneficial Projects are not stranded costs and do not meet the standards articulated in Order No. 888 for when an exit fee would be appropriate. IPL argues that, before it can assess an exit fee, a transmission provider needs to meet several tests:

(1) the customer had to continue to take service from the transmission provider; (2) the costs associated with the exit fee had to be incurred for the benefit of the departing customer; (3) the costs had to be "stranded;" (4) there had to be a reasonable expectation that the transmission provider would need to continue to serve the customer; and (5) the transmission provider had a duty to mitigate any stranded costs.^[25]

23. IPL argues that application of these principles shows that the imposition of an exit fee is not just and reasonable. IPL reiterates that it would not continue to take service from the Midwest ISO. IPL notes that even if another withdrawing member were to continue to take service under the TEMT, "the appropriate course would be to reallocate the [Regionally Beneficial Project] costs among the ongoing transmission revenue requirements and the remaining Transmission Owners and to have the departing Transmission Owner pay for the use of facilities through the transmission access

²⁴ *Id.* at Att. A. As noted above, the RECB II Order and RECB I Further Order on Rehearing directed the Midwest ISO to make an informational filing by August 1, 2007 discussing the relationship between RECB I, RECB II and pricing for existing facilities and its experience with the RECB pricing mechanisms to date. The Midwest ISO timely submitted this informational compliance filing. IPL filed a separate informational filing. Among other things, IPL criticizes the RECB I and RECB II cost allocation methodologies, focusing on the cost-shifting effects of the rate design. It asks the Commission re-open the RECB I and RECB II processes to allow for reconsideration of consumer protection measures. IPL seeks a paper hearing process as well as additional tracking measures and metrics.

²⁵ IPL Request for Rehearing at 20-21 (emphasis omitted).

charge.”²⁶ IPL also argues that there has been no showing that costs associated with Regionally Beneficial Projects will benefit IPL’s transmission customers. Moreover, IPL argues that these costs are not trapped with the transmission provider, because Attachment GG provides a mechanism to update the allocation of costs of Regionally Beneficial Projects annually across the remaining loads within the Midwest ISO footprint. Further, IPL argues that there was no reasonable expectation that the Midwest ISO would continue to have to provide service to each and every Transmission Owner and no guarantee that any entity would always continue to be a member of the Midwest ISO. Finally, IPL argues that there are no stranded costs here. It maintains that transmission providers have a duty to mitigate costs and, if the capacity is used for other customers, the exit fee should be reduced accordingly.²⁷ IPL argues that costs are only stranded if capacity is unsold (or resold below the full embedded cost) after the transmission provider mitigates costs.

24. Fifth, IPL argues that the Commission’s assignment of costs associated with Regionally Beneficial Projects to withdrawing members will create a strong disincentive for entities to join RTOs.

25. Finally, IPL argues that the revised tariff language accepted in the RECB II Order on Rehearing and Compliance²⁸ is overbroad. IPL argues that the revised language refers to Attachment FF in general, and thus could be read to apply not only to costs associated with Regionally Beneficial Projects, but to costs associated with Baseline Reliability Projects. IPL argues that this is procedurally improper because the RECB II Order did not address the cost allocation methodology for Baseline Reliability Projects. IPL maintains that “[f]or the Commission now to require modifications of the TEMT so that a departing Transmission Owner is to be responsible not only for costs associated with [Regionally Beneficial Projects] but also for Baseline Reliability Projects would require a separate section 206 proceeding to determine that the current tariff as applied to Baseline Reliability [P]rojects was unjust and unreasonable.”²⁹ IPL notes that such a determination would have to be implemented on a prospective basis. Accordingly, IPL suggests that the Commission, at a minimum, require section III.A.2.i of Attachment FF be modified to read:

²⁶ *Id.* at 21.

²⁷ *Id.* at 22 (citing *City of Alma, MI*, 80 FERC ¶ 61,265, at 61,961 (1997)).

²⁸ See *infra* section III.C.3.

²⁹ IPL Request for Rehearing at 25.

A Party that withdraws from the Midwest ISO shall remain responsible for all financial obligations incurred for Regionally Beneficial Projects pursuant to this Attachment FF while a Member of the Midwest ISO and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by the Midwest ISO and the withdrawing Member.^{30]}

3. Commission Determination

26. We will reject IPL's rehearing request on the grounds that rehearing does not lie. The Commission does not allow rehearing of an order denying rehearing.³¹ Any other result would lead to never-ending litigation as every response by the Commission to a party's argument would allow yet another opportunity for rehearing unless presumably that response were word-for-word identical to what the Commission earlier said.³² Litigation before the Commission cannot be allowed to drag on indefinitely – at some point it must end – and so the Commission does not allow parties to seek rehearing of an order denying rehearing. And, as the U.S. Court of Appeals for the District of Columbia Circuit has put it, even an “improved rationale” would not justify a further request for rehearing.³³

27. Rehearing of an order on rehearing only lies when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.³⁴ In fact, a second rehearing request is required to preserve appellate review

³⁰ *Id.*

³¹ *Bridgeport Energy, LLC*, 114 FERC ¶ 61,265, at P 8 (2006) (citing *Southern Co. Servs., Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Co. d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Pub. Serv. Co.*, 65 FERC ¶ 61,088 (1993)).

³² *Id.* (citing *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (rejecting the notion of “infinite regress” that would “serve no useful end”)).

³³ *Id.* (citing *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (*Southern*) (citing *Tenn. Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988))).

³⁴ *Id.* P 9 (citing *Southern*, 877 F.2d at 1073).

rights in instances when the later order modified the results of the earlier order in a significant way.³⁵

28. Here, in the RECB II Order on Rehearing and Compliance, the Commission denied IPL's request for rehearing and affirmed the findings in the RECB II Order (albeit with some clarifications). In these circumstances, IPL's current rehearing request is neither required nor appropriate. The fact that the Commission directed clarifying revisions to the Midwest ISO's proposed tariff language does not modify the results of the RECB II Order, and does not otherwise constitute a significant modification of that order.

29. Although the RECB II Order on Rehearing and Compliance required additional revisions to the TEMT on this issue, those revisions did not change the Commission's basic determination that "withdrawal does not absolve a transmission owner of its responsibility for the costs of upgrades previously allocated to it."³⁶ Moreover, as indicated in the RECB II Order on Rehearing and Compliance, IPL's protest of the April 16 Compliance Filing did not raise any issues not addressed in its request for rehearing of the RECB II Order.³⁷ In addition, we disagree with IPL that the Commission "may have overlooked or misunderstood facts or arguments" set forth in IPL's prior rehearing request, so we will not entertain IPL's rehearing request as a "motion for reconsideration" of the RECB II Order on Rehearing and Compliance. Accordingly, consistent with the precedent cited above, we will reject IPL's rehearing request.

30. Even if we were to consider the merits of IPL's request for rehearing, we would not be persuaded by its arguments. IPL has not raised any new issues that would cause the Commission to reverse its determination that a Transmission Owner seeking to withdraw from the Midwest ISO is responsible for its share of costs allocated to it under Attachment FF while it was still a member.

31. First, as stated in the RECB II Order on Rehearing and Compliance, the cost allocations made under Attachment FF are rightfully included in the "all financial obligations" contemplated by the TO Agreement. "This treatment is consistent with the Commission's previous actions regarding the creation and inclusion of Schedules 16 and

³⁵ *Id.* (citing *Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood, Mass. v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990)).

³⁶ RECB II Order on Rehearing and Compliance, 120 FERC ¶ 61,080 at P 74.

³⁷ *Id.* P 79, 86.

17 cost allocations into the Midwest ISO's TEMT."³⁸ We disagree with IPL that this requires members to be responsible for an "up-front lump-sum payment on a net present value basis" of its responsibilities under Attachment FF. As IPL notes, there is no "exit fee methodology;"³⁹ "[t]he mechanism for finalizing and paying all cost allocations would have to be negotiated by the Midwest ISO and the departing owner during the calculation of the exit fee and then approved by the Commission under the terms of Article Seven, section D of the TO Agreement."⁴⁰ We note that, after its withdrawal from the Midwest ISO, Louisville Gas & Electric Company retained cost responsibility for multiple transmission projects within the Midwest ISO as part of its negotiated settlement.⁴¹

32. IPL argues that if a withdrawing member continues to take transmission service under the TEMT, it "will not 'selectively avoid such obligations' to pay for the facilities but will support them through the transmission charge it pays for the future service."⁴² We disagree with IPL's claim that an exiting transmission-owning member that does not receive service under the TEMT does not benefit from the facilities. As a practical matter, even if IPL were to withdraw from the Midwest ISO and no longer receive transmission service under the TEMT, it would continue to benefit from the Midwest ISO's functioning as reliability coordinator of the neighboring transmission system. Should IPL withdraw from the Midwest ISO, pursuant to the TO Agreement, it will negotiate an exit fee that includes cost obligations that IPL incurred under the TEMT – these obligations will include allocations arising under Attachment FF.⁴³ We will address issues regarding the appropriate amount of the exit fee under the specific facts and circumstances of IPL's departure.

33. With respect to IPL's argument that cost allocation under RECB II would entitle a Transmission Owner to "part owner" status (and Fifth Amendment concerns attendant

³⁸ *Id.* P 83.

³⁹ IPL Request for Rehearing at 12.

⁴⁰ RECB II Order on Rehearing and Compliance, 120 FERC ¶ 61,080 at P 84.

⁴¹ *Louisville Gas and Elec. Co.*, 114 FERC ¶ 61,282, at P 61, *order on reh'g sub nom. E.ON U.S. LLC*, 116 FERC ¶ 61,020 (2006).

⁴² IPL Request for Rehearing at 13.

⁴³ Article Five, section II.B of the TO Agreement states that "[a]ll financial obligations incurred and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by the Midwest ISO and the withdrawing Owner."

thereto), we note that IPL has raised this argument for the first time in its rehearing request. Because this issue is based on matters available for consideration at the time of the RECB II Order on Rehearing and Compliance, IPL should have presented this argument on rehearing of the RECB II Order.⁴⁴ As the RECB II Order on Rehearing and Compliance did not change any of our prior determinations (and thereby introduce material not then available for consideration) IPL is not entitled to raise this argument now. In any event, we disagree with IPL that a withdrawing member should be considered a “part owner” of a Regionally Beneficial Project and therefore, entitled to financial rights relating to that ownership. IPL’s argument fails to recognize that an exiting transmission-owning member is contractually-obligated to meet financial obligations that it incurred as a signatory to the TO Agreement. Under the terms of the TO Agreement, a transmission owner does not acquire ownership rights in a Regionally Beneficial Project. “Without a property right, there could be no ‘taking within the meaning of the Fifth Amendment.’”⁴⁵ Accordingly, IPL’s takings argument is without merit because it has no property right in a Regionally Benefit Project for which it is required to contribute a share of costs as a member of the Midwest ISO.

34. Regarding any cost shifts which IPL may be experiencing, we would point IPL to language in Attachment FF requiring the Transmission Provider and the Tariff Working Group to review designations of cost responsibility for unintended consequences and to report such consequences to the Planning Advisory Committee and the OMS.⁴⁶ This is the mechanism under the TEMT for IPL to address its cost shifting concerns.⁴⁷ If IPL proposes to withdraw from the Midwest ISO, we will review that specific proposal to

⁴⁴ See 18 C.F.R. § 385.713(c)(3) (2007); see also *Keyspan-Ravenswood LLC v. N.Y. Indep. Sys. Operator Inc.*, 119 FERC ¶ 61,319, at n.12 (2007); *Trans Alaska Pipeline Sys.*, 67 FERC ¶ 61,175, at 61,531 (1994).

⁴⁵ See *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1200 (D.C. Cir. 1995) (citing *Peterson v. United States Dep't of Interior*, 899 F.2d 799, 807 (9th Cir.) (citing *Bowen v. Public Agencies*, 477 U.S. 41, 55-56 (1986)), cert. denied, 498 U.S. 1003 (1990)).

⁴⁶ RECB I Order, 114 FERC ¶ 61,106 at P 130.

⁴⁷ While all parties retain any rights they may have under FPA section 206 to file a complaint with the Commission, we encourage parties to exhaust the avenues for redress through the stakeholder process before exercising their section 206 rights. See, e.g., *New England Power Pool*, 107 FERC ¶ 61,135, at P 24 (2004); *New Power Co. v. PJM Interconnection, L.L.C.*, 98 FERC ¶ 61,208, at 61,759 (2002); *Morgan Stanley Capital Group Inc. v. PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,331, at 62,269 (2001).

determine if it satisfies all of the terms of the TO Agreement respecting withdrawal, including the determination of cost responsibilities incurred under Attachment FF.⁴⁸

35. We also disagree with IPL that Order No. 888 precludes the inclusion of costs associated with Regionally Beneficial Projects in exit fees.⁴⁹ At the outset, we note that the Commission has previously said that “Order No. 888’s stranded cost policy applies to stranded generation assets, not stranded investments for start-up of RTOs”⁵⁰ However, the posited situation – of IPL petitioning to leave the Midwest ISO – requires that IPL fulfill its financial obligations incurred pursuant to the TO Agreement. Meeting such financial obligations is not properly compared to the “*extra-contractual* recovery of stranded costs associated with a limited set of existing . . . wholesale requirements contracts . . .” which was the subject of Order No. 888, arising from “an entirely different regulatory regime . . . as a result of customers leaving the utilities’ generation systems through Commission-jurisdictional open access tariffs”⁵¹

36. Moreover, we strongly disagree with IPL that requiring a withdrawing member to pay its share of Attachment FF costs would create a strong disincentive for entities to join RTOs. In fact, the failure to hold a Transmission Owner accountable for charges incurred while it was a member of an RTO would be a disincentive for entities to join. “[F]ailing to include the costs allocated to a member under Attachment FF would create volatility and uncertainty in the ratemaking process by transferring costs . . . to remaining members.”⁵²

⁴⁸ *Louisville Gas and Elec. Co.*, 114 FERC ¶ 61,282 (2006).

⁴⁹ We note that IPL has raised this argument for the first time in this rehearing. See *supra* note 44.

⁵⁰ *Midwest Indep. Transmission Sys. Operator, Inc.*, 101 FERC ¶ 61,221, at P 57 (2002), *reh’g denied*, 103 FERC ¶ 61,035 (2003).

⁵¹ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,637, 31,788 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002) (emphasis added).

⁵² RECB II Order on Rehearing and Compliance, 120 FERC ¶ 61,080 at P 83.

37. Finally, we disagree that the Commission erred in permitting tariff language on this issue that refers to Attachment FF in general, rather than just Regionally Beneficial Projects. We note that we required the referenced tariff language⁵³ and that this language does not alter any existing rate treatment (*i.e.*, the financial obligations referred to in the TO Agreement do not include an exemption for cost allocations arising from Baseline Reliability Projects).⁵⁴

C. August 22 Compliance Filing

1. Determination of Installed Costs

a. RECB II Order on Rehearing and Compliance and August 22 Compliance Filing

38. The RECB II Order on Rehearing and Compliance directed the Midwest ISO to further revise the compliance tariff language to reflect that the Midwest ISO did not intend “to disqualify the entire project from regional cost sharing, but rather, only those costs determined to be unreasonably in excess of the cost estimates,”⁵⁵ consistent with the alternative in its answer that the Midwest ISO would “accept the actual costs of the project without regard for how those final costs compare to the original estimates.”⁵⁶ The Commission also directed the Midwest ISO “to remove the language regarding the reimbursement of [Construction Work in Progress] charges collected for a project for which actual costs are higher than estimated.”⁵⁷ Further, the Commission directed the Midwest ISO to explicitly list the fixed charge rate as the rate found in Attachment GG or, in the alternative, repeat those rates set forth in Attachment FF.⁵⁸

39. In the August 22 Compliance Filing, the Midwest ISO proposes to modify Attachment FF, section II.B.1.c, in relevant part, as follows:

⁵³ RECB II Order, 118 FERC ¶ 61,209 at P 193; RECB II Order on Rehearing and Compliance, 120 FERC ¶ 61,080 at P 55, 58.

⁵⁴ RECB II Order on Rehearing and Compliance, 120 FERC ¶ 61,080 at P 46, 59.

⁵⁵ *Id.* P 55, 58.

⁵⁶ *Id.* P 55.

⁵⁷ *Id.* P 59.

⁵⁸ *Id.* P 60.

The benefits of the project and the cost allocations as a percentage of project cost shall be determined one time at the time that the project is presented to the Transmission Provider Board for approval. Estimated project installed costs will be used to estimate the benefits/costs ratio and the eligibility for cost sharing at the time of project approval. Final determination of the benefits/costs ratio and therefore the eligibility for cost sharing will be based on the actual installed cost of the project when completed. To the extent that the Commission approves the collection of costs in rates for Construction Work in Progress (“CWIP”) for a constructing Transmission Owner, costs will be allocated and collected prior to completion of the project. ~~In the event that the actual installed costs of the project is such that the threshold benefit/cost ratio is below the threshold to establish a Regionally Beneficial Project, the Transmission Provider will reimburse for charges made to the Transmission Customers taking service outside of the pricing zone of the constructing Transmission Owner.~~ The benefit/costs ratio threshold shall be based on the planned in-service date of the project, such that a project with an in-service date within one year of the approved MTEP initially recommending the project shall have a minimum benefits/costs threshold of at least 1.2:1.^[59]

b. Comments

40. ATCLLC and Integrys state that the RECB II Order on Rehearing and Compliance directed the Midwest ISO to file revised tariff sheets to make clear that the Midwest ISO should “accept the actual costs of the project without regard for how those final costs compare to the original estimates.”⁶⁰ ATCLLC and Integrys ask the Commission to direct the Midwest ISO to remove from section II.B.1.c of Attachment FF the sentence stating: “Final determination of the benefits/costs ratio and therefore the

⁵⁹ August 22 Compliance Filing at Proposed Second Substitute Original Sheet No. 1839C and Substitute Original Sheet No. 1839C.01.

⁶⁰ ATCLLC Protest at 2 (*citing* RECB II Order on Rehearing and Compliance, 120 FERC ¶ 61,080 at P 58); Integrys Protest at 2 (*citing* same).

eligibility for cost sharing will be based on the actual installed cost of the project when completed.”⁶¹

c. Answer

41. In its answer, the Midwest ISO agrees that the cited language is from its original RECB II proposal and states that, upon issuance of an order by the Commission, it will remove the phrase from the TEMT.

d. Commission Determination

42. We agree with ATCLLC and Integrys that the cited sentence should be removed from section II.B.1.c of Attachment FF. We direct the Midwest ISO to file a compliance filing, within 30 days of the date of this order, deleting this sentence. With the exception of that deletion, the Commission finds that the Midwest ISO’s changes to section II.B.1.c of Attachment FF with respect to the determination of installed costs satisfy the Commission’s directives in the RECB II Order of Rehearing and Compliance.

2. Treatment of “Other Projects”

a. RECB II Order on Rehearing and Compliance and August 22 Compliance Filing

43. In the original RECB II proposal, the Midwest ISO proposed the creation of a new category for transmission expansions – network upgrades that do not qualify as Baseline Reliability Projects, Regionally Beneficial Projects or New Transmission Access Projects, but deserve to be included in the MTEP when they are justified under the criteria of Appendix B of the TO Agreement and section I.A. of Attachment FF, and do not violate any reliability criteria. Under the Midwest ISO’s proposal, such “Other Projects” (originally proposed as section II.C of Attachment FF) would have been able to be proposed by the Midwest ISO, Transmission Owners, independent transmission companies, market participants, or regulatory authorities. In the RECB II Order, the Commission found that the Midwest ISO had not adequately explained its proposal regarding Other Projects and rejected those provisions.⁶²

44. In the RECB II Order on Rehearing and Compliance, the Commission denied rehearing and accepted the Midwest ISO’s proposed deletion of the “Other Projects”

⁶¹ ATCLLC Protest at 2-3 (*citing* section II.B.1.c, Attachment FF, Original Sheet No. 1839C.01); Integrys Protest at 2 (*citing* same).

⁶² RECB II Order, 118 FERC ¶ 61,209 at P 169.

provision. The Commission noted that it remained unclear why the “Other Projects” provision was necessary.⁶³

45. In the August 22 Compliance Filing, the Midwest ISO agrees with the Commission’s finding in the RECB II Order on Rehearing and Compliance that the RECB II methodology will not “preclude parties from supporting the construction of projects that, although failing to satisfy the benefits test set forth in the RECB II proposal, provide benefits that are sufficient to allow them to support the projects financially.”⁶⁴ However, the Midwest ISO states that the “Other Projects” language in the context of section III of Attachment FF (which describes the designation of cost responsibility for MTEP projects) remains necessary:

. . . to avoid any ambiguity that the provisions and requirements in the [TO Agreement] remain in full force and effect for the Network Upgrades that are included in the [MTEP] . . . , but are not otherwise subject to a specific cost recovery mechanism, under Attachment FF.[⁶⁵]

b. Comments

46. ATCLLC states that the “Other Projects” language is not objectionable, but also not necessary. It argues that “the RECB II cost allocation methodology does not preclude parties from recovering costs for projects in the MTEP that do not satisfy the RECB II requirements because recovery for those projects is controlled by the legal requirements in the [TO] Agreement and the TEMT.”⁶⁶

c. Answer

47. The Midwest ISO disagrees with ATCLLC that the “Other Projects” category is unnecessary. The Midwest ISO states that “[a]ll projects in MTEP need to have a categorization to avoid unnecessary confusion as to which cost allocation methodology is assigned to each project.”⁶⁷ It argues that Attachment FF defines three categories of

⁶³ RECB II Order on Rehearing and Compliance, 120 FERC ¶ 61,080 at P 71.

⁶⁴ August 22 Compliance Filing at 3 (*citing* RECB II Order on Rehearing and Compliance, 120 FERC ¶ 61,080 at P 71).

⁶⁵ *Id.* (internal citations omitted).

⁶⁶ ATCLLC Protest at 3-4.

⁶⁷ Midwest ISO Answer at 4.

projects: Baseline Reliability Projects, Regionally Beneficial Projects and Transmission Access Projects. It notes that these three categories do not cover the following types of projects that could be listed in an MTEP report:

(i) reliability projects proposed by Transmission Owners that are based on local reliability planning criteria that may exceed NERC reliability criteria; (ii) economic projects proposed by Transmission Owners that are beneficial to localized areas but do not meet the [Regionally Beneficial Project] economic threshold criteria; and (iii) Transmission Owner initiated projects that may prove to be cost shared [Baseline Reliability Projects], or [Regionally Beneficial Projects] but for which the Midwest ISO has not yet determined the cost sharing of, but that the Transmission Owner requires (for state regulatory proceedings or other cost recovery reasons under the Tariff) be included in the MTEP.^{68]}

The Midwest ISO says that these three types of projects make up the “Other Projects” category.

d. Commission Determination

48. The Commission continues to believe that the Midwest ISO’s original language proposing “Other Projects” as a distinct category of transmission expansions was not adequately supported and therefore properly rejected.⁶⁹ However, we will not require the Midwest ISO to make any changes to the discussion of the allocation of costs associated with “Other Projects” as set forth in section III.A.2.h of Attachment FF. The Commission agrees that projects included in the MTEP should have some kind of general classification, whether it is Baseline Reliability Project, Regionally Beneficial Project or Transmission Access Project. The Commission agrees that certain projects could properly be included in the MTEP but not fall into one of those three general categories. We find that identifying projects that do not qualify for cost sharing under the three general categories as “Other Projects” is appropriate. We note, however, that the proposed tariff sheets in the August 22 Compliance Filing label the “Other Projects” provision as III.A.2.i, rather than III.A.2.h. We direct the Midwest ISO to correct the paragraph numbering in the compliance filing to be filed within 30 days of the date of this order.

⁶⁸ *Id.* at 4-5.

⁶⁹ RECB II Order, 118 FERC ¶ 61,209 at P 169-70; RECB II Order on Rehearing and Compliance, 120 FERC ¶ 61,080 at P 69-72.

3. Cost Obligations for Withdrawing Members

a. RECB II Order on Rehearing and Compliance and August 22 Compliance Filing

49. As indicated above,⁷⁰ the RECB II Order on Rehearing and Compliance conditionally accepted the Midwest ISO's proposed language for a new section III.A.2.i of Attachment FF, subject to the Midwest ISO clarifying the language to ensure that the scope of the provision is limited to financial obligations under Attachment FF.⁷¹

50. In the August 22 Compliance Filing, the Midwest ISO proposes the following modification to section III.A.2.ii:

Withdrawal from Midwest ISO: A Party that withdraws from the Midwest ISO shall remain responsible for all financial obligations incurred pursuant to this Attachment FF while a Member of the Midwest ISO and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by the Midwest ISO and the withdrawing member-~~including, but not limited to, all obligations incurred by the Member pursuant to Attachment FF.~~^{72]}

b. Commission Determination

51. The Midwest ISO's proposed tariff modifications are consistent with the Commission's directives in the RECB II Order on Rehearing and Compliance. We note, however, that the proposed tariff sheets in the August 22 Compliance Filing label the "Withdrawal from Midwest ISO" provision as III.A.2.ii, rather than III.A.2.i. We direct the Midwest ISO to correct the paragraph numbering in the compliance filing to be filed within 30 days of the date of this order.

4. Ministerial Changes

52. The RECB II Order on Rehearing and Compliance required the Midwest ISO to fix grammatical errors in the language of section II.B.1.b and II.B.1.c of Attachment FF proposed in the April 16 Compliance Filing.⁷³ In the August 22 Compliance Filing, the

⁷⁰ See *supra* section III.B.1.

⁷¹ RECB II Order on Rehearing and Compliance, 120 FERC ¶ 61,080 at P 86.

⁷² August 22 Compliance Filing at Proposed Second Revised Sheet No. 1849D.

⁷³ RECB II Order on Rehearing and Compliance, 120 FERC ¶ 61,080 at P 61.

Midwest ISO proposes a revision to section II.B.1.b. Although the transmittal letter accompanying the filing states that the Midwest ISO also made the required revision to section II.B.1.c,⁷⁴ the Midwest ISO's revisions to section II.B.1.c, which include the deletion of certain language regarding the determination of installed costs, supercede the ministerial changes directed in the RECB II Order on Rehearing and Compliance.⁷⁵

53. The Midwest ISO's proposed modification to section II.B.1.b is consistent with the Commission's directives in the RECB II Order on Rehearing and Compliance and, accordingly, we accept the revised tariff sheet. The required change to section II.B.1.c. is moot as a result of the Midwest ISO's compliance with the other directives in the RECB II Order on Rehearing and Compliance.

The Commission orders:

(A) IPL's request for rehearing is hereby rejected, as discussed in the body of this order.

(B) The Midwest ISO's August 22 Compliance Filing is hereby conditionally accepted, as discussed in the body of this order.

(C) The Midwest ISO is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁷⁴ August 22 Compliance Filing at 4.

⁷⁵ See *supra* section III.C.1.c.